

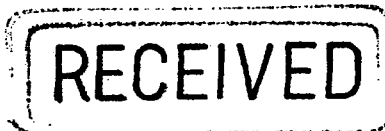
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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SEP 2 - 1988



OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SEP 9 1988

SUBJECT: Arkansas Chemical Co. Site, Newark, New Jersey -
Proposal to Execute Memorandum of Agreement with
Newark

FROM: Steven L. Leifer *Steven L. Leifer*
Acting Associate Enforcement Counsel for Waste

TO: Douglas R. Blazey
Regional Counsel, Region II

This memorandum is in response to yours of June 21, 1988, on the captioned subject. Your memorandum sought my office's views as to whether approval by the Department of Justice or consultation with OECM-Waste is necessary for Region II to enter into a proposed Memorandum of Agreement between the City of Newark and U.S. EPA. Laurence Groner of my staff and William Tucker of yours already have discussed this matter at some length, and Larry orally communicated to Bill the substance of this memorandum on July 13.

Based on my understanding of the proposed Memorandum of Agreement ("MOA"), my view is that execution of the MOA should await prior Department of Justice (DOJ) written approval and OECM-Waste consultation. (All statutory citations below refer to CERCLA.)

Section 122(h)(1) authorizes EPA administratively to "consider, compromise and settle" Sec. 107(a) claims for recovery of costs pursuant to Sec. 104, where the claims have not been referred to DOJ and where total response costs do not exceed \$500,000. In this case, Region II anticipates that total response costs will exceed \$500,000 by approximately \$3 million or more. However, the Region suggests that DOJ approval of the MOA is not required because the MOA does not confer on Newark a covenant not to sue, which, for purposes of the draft Sec. 122(h)(1) guidance, appears to be an element of the term "compromise."

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However, EPA does commit itself, in Paragraph 12 of the proposed MOA, to

enter into negotiations with [a] potential purchaser . . . for a covenant not to sue . . . for past response costs . . . and for release of any CERCLA liens

The DOJ feels strongly that EPA lacks authority under Sec. 122(h) unilaterally to conclude the proposed agreement. While my office hasn't reached an independent legal judgment whether Sec. 122(h) compels a DOJ role in this agreement, we believe it would be best if we adopted a conservative approach and sought DOJ approval pending resolution of the legal issue.

I appreciate your seeking our analysis of this matter. If you should have any questions or comments about this memorandum, please call me, or have your staff call Laurence Groner of mine, at FTS 475-9769.

cc: William Tucker, Office of Regional Counsel,
Regional II
Joyce Rechtschaffen, Environmental Enforcement
Section, Dept. of Justice
Lloyd Guerci, Director, CERCLA Enforcement Division
Lisa Friedman, Associate General Counsel
Carolyn Thompson, OWPE